IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Search of:	**)**	
	)	**Case No. 06-231-M-01 (TFH)**
RAYBURN HOUSE OFFICE BUILDING	**)**	
ROOM NUMBER 2113	**)**	
WASHINGTON, D.C. 20515	**)**	

GOVERNMENT'S OPPOSITION TO REPRESENTATIVE WILLIAM JEFFERSON'S MOTION FOR STAY PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(1)(A), Representative William Jefferson has filed a Motion for Stay Pending Appeal ("Mot.") of this Court's July 10, 2006, Order denying his motion for return of property. The Motion for Stay should be denied because (1) there is a substantial question whether Rep. Jefferson may appeal the Order at this time, and, even assuming that he may, his sweeping claim of privilege has little chance of succeeding for the reasons set forth in this Court's Memorandum Opinion ("Mem. Op."); (2) Rep. Jefferson will not suffer any cognizable—let alone irreparable—harm in the absence of a stay, especially given that any claim of privilege he may assert with respect to any seized material will be fully litigated and resolved by this Court before any member of the prosecution team receives such material; (3) a stay would further delay an ongoing and very serious investigation, thereby threatening the vindication of our criminal laws; and (4) relatedly, a stay would run contrary to the interests of the Congressman's constituents and the public at large, who have a substantial stake in prompt determination about whether one of their elected representatives accepted bribes—and also paid out bribes to high-ranking foreign officials—in exchange for personal gain.

STATEMENT

The Government has been investigating for some 16 months whether Rep. Jefferson used his position as a sitting Congressman to promote the sale of telecommunications equipment and services offered by iGate—a Louisville-based communications firm—to Nigeria, Ghana, and possibly other African nations, in return for payments of stock and cash. Mem. Op. 2; *see generally* Redacted Search Warrant Affidavit ("Aff.") ¶¶ 5-6, 8-81.[1] During that time, federal agents have gathered substantial evidence indicating Rep. Jefferson's involvement in the iGate scheme and at least seven other schemes in which the Congressman sought things of value in exchange for his performance of official acts. Aff. ¶ 82; *see generally id*. ¶¶ 83-122.

Based on the foregoing and other evidence, subpoenas were issued during late summer 2005 to Rep. Jefferson and his Chief of Staff. *See Communication from the Hon. William J. Jefferson, Member of Congress*, 151 Cong. Rec. H8061 (daily ed. Sept. 15, 2005) (informing House Speaker of subpoena); *Communication from the Chief of Staff of Hon. William J. Jefferson, Member of Congress*, 151 Cong. Rec. H11026 (daily ed. Nov. 18, 2005) (same). In the following months, the Government worked to obtain relevant records and "exhausted all reasonable and timely * * * means of obtaining the evidence sought" short of requesting a warrant to search the Congressman's office. Mem. Op. 26.

"[U]nable to obtain the evidence sought through any other reasonable means," Mem. Op. 26, the Government eventually did apply for a warrant to search the office, *see id*. at 2-4. Finding that the warrant application and supporting affidavit established probable cause, this Court authorized

[1] As in its other publicly-filed pleadings, the Government herein refers only to the redacted affidavit and to other information that is already part of the public record.

the warrant. *See id*. at 4. Federal agents executed the warrant on May 20, 2006, and ultimately seized copies of computer files and two boxes of paper records. *See ibid*. Pursuant to procedures approved by this Court when it issued the search warrant, as well as additional procedures adopted subsequently, the seized documents were to be reviewed by a filter team unconnected to the prosecution team, and none of the documents were to be disclosed to the prosecution team until after Rep. Jefferson was given an opportunity to raise and have this Court resolve any claim of privilege. *See id*. at 3-4. On May 25, the President directed the Solicitor General of the United States to take sole custody of the seized documents and to seal and sequester them from anyone outside of the Solicitor General's office for 45 days. *See id*. at 1 n.1. The President took that step in the spirit of inter-Branch comity, in order to provide time for discussions between the Department of Justice and the House of Representatives concerning the proper disposition of the seized documents. The President's directive expired on July 9. *See id*. at 27 n.12.

"Pursuant to Fed. R. Crim. P[.] 41(g)," Rep. Jefferson filed a motion for return of the seized documents. Mot. for Return of Property 1. On July 10, after considering briefing and argument from the parties and *amicus curiae*, this Court denied the motion. *See generally* Mem. Op. 1-28. In light of that ruling, and because the President's directive to the Solicitor General had expired, the Court further ordered that "the Department of Justice shall be free to regain custody of the seized materials, and to resume its review thereof, as of Monday, July 10, 2006." 7/10/06 Order. On July 11, Rep. Jefferson filed his motion for a stay of the Court's Order pending appeal. He seeks that relief "in order to maintain the status quo while the litigation proceeds," Mot. 3, and argues that the seized documents "should remain in the custody of the Solicitor General" and should not be reviewed by

anyone within the Executive Branch "until the matter has been resolved on appeal," *id*. at 3, 6.[2]

In the wake of the Court's Order, the Attorney General has directed the FBI to take custody of the documents, but he has also directed that review of the documents by the filter team not begin for two weeks in order to allow for this Court—and, if necessary, the D.C. Circuit—to consider Rep. Jefferson's arguments for a stay. If the Congressman's motion(s) for stay are denied before the end of the two-week period, the review would begin sooner. If instead a stay is granted, the FBI would of course comply with that order.

ARGUMENT

In this Circuit, settled case law governing motions for stay pending appeal requires consideration of four factors:

> (1) Has the [movant] made a strong showing that [he] is likely to prevail on the merits of [his] appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the [movant] shown that without such relief, [he] will be irreparably injured? The key word in this consideration is irreparable. * * * The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * * Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. (4) Where lies the public interest?

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[2] Rep. Jefferson states in his factual recitation (Mot. 2 n.2) that, by virtue of the parties' May 26 consent motion, the Government agreed to "maintain the materials under seal" in the Solicitor General's office even beyond July 9. But as Rep. Jefferson acknowledges (*ibid*.; *see* Supp. to Mot. for Stay 2), the consent motion and the proposed order attached thereto made clear that the Government agreed only to maintain the materials under seal "pending further Order of this Court." Consent Mot. 5 (attached to Mot. for Stay). The Court has now issued that further order, directing that "the Department of Justice shall be free to regain custody of the seized materials, and to resume its review thereof, as of Monday, July 10, 2006." 7/10/06 Order. Thus, barring the grant of a new stay, the Department of Justice is free to review the documents at issue.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Petroleum Jobbers*"); *see Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*WMATC*") (reaffirming *Petroleum Jobbers*); *see also* D.C. Cir. R. 8(a)(1). Whether to grant or deny a stay depends on a "balance of equities" and, accordingly, the decision rests within the sound discretion of this Court. *WMATC*, 559 F.2d at 844-45. Furthermore, as Rep. Jefferson acknowledges (Mot. 3), he as the moving party carries the burden of showing that the status quo should be maintained notwithstanding this Court's specific Order to the contrary. *See Petroleum Jobbers*, 259 F.2d at 926 (the movant's "inadequate showing on the * * * enumerated considerations prevents us from granting the stay [he] has requested"). The Congressman's motion falls well short of carrying that burden.

1. There is little likelihood that Rep. Jefferson's appeal will succeed on the merits.

a. As a threshold matter, the Congressman has not attempted to show that the Court's Order is appealable at this interlocutory juncture, and there is a substantial question whether it is. It is a fundamental premise of federal procedure that appeals may normally be taken only from final orders and judgments. *See* 28 U.S.C. § 1291 ("The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]"); *see also, e.g.*, *Cobbledick v. United States*, 309 U.S. 323, 324 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure."); *In re Sealed Case*, 655 F.2d 1298, 1300 (D.C. Cir. 1981) ("[I]nsistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice[.]" (quotation omitted)). The Supreme Court and the D.C. Circuit have repeatedly emphasized that the final-judgment rule "is at its strongest in the field of criminal law," *Flanagan v. United States*, 465 U.S. 259, 264 (1984)

(quotation omitted), where the delay associated with interlocutory appeal is "particularly damaging" to the public's interest in the swift dispatch of justice, *Sealed Case*, 655 F.2d at 1300 (quotation omitted).

In accordance with these precepts, the Supreme Court in *Di Bella v. United States*, 369 U.S. 121 (1962), held in the Rule 41 context specifically that appellate courts generally lack jurisdiction over an interlocutory appeal from a pre-indictment denial of a motion for return of property. *Id*. at 131. The Court in *Di Bella* made clear that the only exception to this rule is for cases in which "the motion is *solely* for return of property and is in no way tied to a criminal prosecution in esse [*i.e.*, in existence] against the movant." *Id*. at 131-32 (emphasis added). Rep. Jefferson's Motion for Stay does not explain how his Rule 41 motion falls within this exception, and it is difficult to see how it could. As an initial matter, the Rule 41 motion is arguably "tied to a criminal prosecution in esse."[3] *Di Bella*, 369 U.S. at 132. In any event, it is quite clear that the motion seeks much more than just the return of the documents seized from the Congressman's office: it seeks to preclude the Government from "review[ing]" or otherwise using the documents at all. *E.g.*, Mem. in Support 15. In other words, under Rep. Jefferson's Rule 41 motion, it is not enough for the Government to return

[3] The courts of appeals have to some degree reached conflicting conclusions about the scope of this prong of the *Di Bella* exception. *Compare Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir. 1982); *United States v. Furina*, 707 F.2d 82, 84-85 (3d Cir. 1983); *United States v. Regional Consulting Servs.*, 766 F.2d 870, 872-73 (4th Cir. 1985); *In re Grand Jury Proceedings*, 724 F.2d 1157, 1159-60 (5th Cir. 1984); *Andersen v. United States*, 298 F.3d 804, 807-10 (9th Cir. 2002) *with Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982); *Mr. Lucky Messenger Serv., Inc. v. United States*, 587 F.2d 15, 16 (7th Cir. 1978); *In re Grand Jury Proceedings*, 716 F.2d 493, 496 & n.4 (8th Cir. 1983); *Blinder, Robinson & Co. v. United States*, 897 F.2d 1549, 1554-56 (10th Cir. 1990). The D.C. Circuit, to date, has not squarely ruled on the matter.

the original documents;[4] rather, the Government would have to return any and all *copies* thereof. Because the Congressman seeks to use Rule 41 effectively to nullify the Government's judicially-approved search warrant—thereby hindering an ongoing criminal investigation—his motion seems to raise the same concerns that led *Di Bella* to preclude interlocutory review. *See, e.g.*, *In re Search of 949 Erie St.*, 824 F.2d 538, 541 (7th Cir. 1987) ("Suffice it to say that where the government has offered to provide copies and the movants have not even attempted to show that copies are inadequate [to enable them to carry on their business], we cannot find that the motion is directed primarily toward the return of the seized property."); *In re Grand Jury Proceedings*, 730 F.2d 716, 717-18 (11th Cir. 1984) (per curiam) (dismissing appeal "although the appellants' motion did not specifically seek to suppress the items seized" because "it is obvious from a reading of the motion that appellants are attacking the validity of the search and seizure under the [F]ourth [A]mendment").

To be sure, Rep. Jefferson's Rule 41 motion relies in part on a claim of privilege under the Speech or Debate Clause, and the courts have in some circumstances permitted interlocutory appeal of such claims. *See, e.g.*, *United States v. Rostenkowski*, 59 F.3d 1291, 1296-1300 (D.C. Cir. 1995) (finding jurisdiction to review the denial of a Congressman's motion to dismiss an indictment on Speech or Debate grounds); *see generally Helstoski v. Meanor*, 442 U.S. 500 (1979). But the courts have also refused to take interlocutory jurisdiction over Speech or Debate claims in various other circumstances. *See, e.g.*, *Rostenkowski*, 59 F.3d at 1300-01 (finding no jurisdiction to review the denial of a discovery motion founded on the Speech or Debate Clause); *cf. also, e.g.*, *Powell v.*

[4] Indeed, the Government never even *removed* the computer hard drives from the Congressman's office but rather imaged the computer files contained therein and then removed the images. Similarly, the Government continues to offer Rep. Jefferson access to copies of the paper records that were seized.

Ridge, 247 F.3d 520, 523-27 (3d Cir. 2001) (finding no jurisdiction to review the grant of a discovery motion where appellants objected to it on grounds of "legislative immunity"). Rep. Jefferson has failed to explain why interlocutory appeal would be proper in the circumstances of the instant case, and a number of considerations support a contrary conclusion. First, the Congressman is not seeking dismissal of charges or invoking an immunity from prosecution or from being compelled to testify. *Compare Helstoski*, 442 U.S. at 505-08; *Rostenkowski*, 59 F.3d at 1296-1300. Second, he is claiming a novel, unwarranted, and sweeping right of confidentiality under the Speech or Debate Clause. *See, e.g.*, Mem. Op. 27 ("Congressman Jefferson's interpretation of the Speech or Debate privilege would have the effect of converting every congressional office into a taxpayer-subsidized sanctuary for crime."); *cf. Powell*, 247 F.3d at 522 (emphasizing that the appellants' claim of immunity from discovery was altogether "unknown in the law"). Third, this Court's Order simply (a) permits the filter team to begin its review, and (b) initiates the process of litigating any privilege disputes. The Order therefore does not give rise to the kind of irreparable injury that is generally necessary before interlocutory appeal is permitted. *Cf. Rostenkowski*, 59 F.3d at 1296-97. Finally, permitting interlocutory appeal now would pose the risk of repeated interlocutory appeals, thereby substantially delaying the Government's investigation. *See infra* p. 12.

b. Even were there appellate jurisdiction, Rep. Jefferson has clearly failed to raise "questions going to the merits so serious, substantial, difficult and doubtful" as to justify a stay, *WMATC*, 559 F.2d at 844 (quotation omitted), as this Court's Memorandum Opinion demonstrates. There is no need to repeat here the Government's earlier pleadings, but it bears emphasis that after "carefully consider[ing]" the Congressman's Rule 41 motion, Mem. Op. 1, this Court found no legal authority for the key premises on which the motion was founded: (1) the Court found "no support"

for "the proposition that a Member of Congress must be given advance notice of a search, with an opportunity to screen out and remove materials" he claims to be privileged, *id*. at 17; (2) the Court found "no law" to sustain the argument that a Member must determine for himself the scope of the Speech or Debate privilege, even to the exclusion of the judiciary, *id*. at 21; (3) the Court did not find "any authority" for the contention that "the right to counsel extends to the execution of a search warrant," *id*. at 25; and (4) the Court concluded that the alleged requirement to "exhaust all less intrusive approaches" than a search warrant was "nowhere to be found" in existing law, *ibid*.[5] In short, this was not a case in which the Court was confronted with conflicting authority interpreting the Speech or Debate Clause, the Fourth Amendment, or Rule 41, such that resolution of the Rule 41 motion on appeal would be in "substantial * * * doubt[ ]." *WMATC*, 559 F.2d at 844 (quotation omitted). And although the Government does not dispute that this case raises an important legal issue, *see* Mot. 2, 5, that is not the standard governing motions for stay. The question, rather, is whether Rep. Jefferson has "made a *strong showing* that [he] is *likely to prevail* on the merits of [his] appeal." *Petroleum Jobbers*, 259 F.2d at 925 (emphases added). This Court has all but concluded that he has not.

2. Because Rep. Jefferson has not established a significant likelihood of success on the merits, he must make an especially strong showing of irreparable injury. *See Petroleum Jobbers*, 259 F.2d at 925 (noting that an "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of

[5] The Court likewise found that the Government had in fact "exhausted all reasonable and timely alternative means of obtaining the evidence sought," Mem. Op. 26, and that the Government did so "not because the law requires it, but to demonstrate that it did not lightly or precipitously seek a search warrant in this investigation," *id*. at 25-26.

success on the merits," and that, by the same token, "[w]ithout * * * a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review"); *cf. WMATC*, 559 F.2d at 844 ("[T]he necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors."); *accord* Mot. 5 (citing *WMATC*). Rep. Jefferson's Motion for Stay falls far short on this second factor as well.

It bears emphasis at the outset that Rep. Jefferson's current claim of irreparable injury is extremely narrow. The main thrust of the Congressman's Rule 41 motion was that the execution of the search warrant was unlawful, and that the evidence obtained in the search should therefore be returned to him. But the search warrant has already been executed, and any claimed injury that occurred during that process obviously cannot be prevented by granting a stay. Nor is granting a stay necessary to ensure that the Government does not make impermissible use of legislative-act information in its investigation. To the contrary, Rep. Jefferson will have a full opportunity to raise claims of privilege and have them resolved by this Court before any member of the prosecution team is given access to any of the seized materials. *See Petroleum Jobbers*, 259 F.2d at 925 (emphasizing that "[t]he possibility that adequate * * * corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"). Nor, finally, has the Congressman contended that the Government's mere possession of the seized materials gives rise to irreparable injury. Rather, he seeks only a stay of the process by which the seized materials would be reviewed by a filter team. Mot. 5-6.

Rep. Jefferson's entire claim that the filter-review process would give rise to irreparable injury rests on the bare assertion that "[i]f the [E]xecutive [B]ranch goes ahead and reviews the

materials in the absence of [a] stay, the Congressman's absolute privilege will be lost." Mot. 4; *see id*. at 3 (arguing similarly). That unadorned assertion does not come close to demonstrating that a stay is necessary to prevent irreparable injury that is "both certain and great." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). First, Rep. Jefferson has failed to explain why, contrary to this Court's conclusion, review of the seized documents by a filter team having no involvement in the investigation or prosecution of the case constitutes any injury at all, much less irreparable injury justifying the issuance of a stay.[6] *See* Mem. Op. 19 ("The Speech or Debate Clause is not undermined by the mere incidental review of privileged legislative material, given that Congressman Jefferson may never be questioned regarding his legitimate legislative activities, is immune from civil or criminal liability for those activities, and no privileged material may ever be used against him in court."). In other words, the Congressman's claim of irreparable injury depends entirely on the correctness of his legal claim that any examination of the seized documents would offend the Speech or Debate Clause. For that reason, his failure to demonstrate a likelihood of success on the merits seriously, if not fatally, undermines his ability to show irreparable injury. Second, Rep. Jefferson has not even provided this Court with any specific reason to believe that any of the seized documents, or the computer files that would ultimately be examined by the filter team,

[6] Rep. Jefferson indirectly suggests (Mot. 4) that, absent a stay, the Government would "engage in a wholesale review of all of the records and all of the computer hard drives in the Congressman's office." That is patently wrong. With regard to the computer files on the Congressman's hard drives, no human eyes will ever see the vast majority of them: the narrow search terms enumerated in Schedule C of the search warrant affidavit will automatically and electronically cull out the files unrelated to the investigation, thereby minimizing even the *filter team's* possible exposure to privileged items. Aff. ¶ 148; *see* Mem. Op. 4. With regard to both the computer files and the paper documents, the filter team will presumably be able to screen out obviously irrelevant documents without reviewing them at great length. And, again, even this limited review will be restricted to a handful of officials who have no role in the investigation or prosecution of the case. *See* Mem. Op. 3-4. Such procedures do not remotely prescribe or permit "wholesale review."

would in fact contain legislative-act material. In sum, Rep. Jefferson has completely failed to carry his burden of establishing that a stay is necessary to prevent irreparable injury.

3. Moreover, the substantial delay attending a stay would prejudice the Government's investigation to an extent that cannot be justified by Rep. Jefferson's conclusory assertions of probable success on the merits and irreparable injury. Even an expedited appeal to the D.C. Circuit would likely take months to resolve, and requests for further review by the en banc court or the Supreme Court might lead to substantial further delays. Where, as here, the investigation has already lasted some 16 months—in part because the Government "has been unable to obtain the evidence sought through any * * * reasonable means" short of a search warrant, Mem. Op. 26—the presumption should be even stronger than in the usual case that, pending the interlocutory appeal, "evidence and witnesses may disappear, and testimony [may] become[ ] more easily impeachable as the events recounted become more remote." *Flanagan*, 465 U.S. at 264. Moreover, this inherent prejudice to the Government will likely be exacerbated by the scrupulous litigation procedures described above (*supra* pp. 8, 10; *see also* Mem. Op. 3-4, 19-21): if and when this Court denies Rep. Jefferson's claim of privilege as to any particular document, he may well choose to appeal that denial, slowing the investigation further. Accordingly, "the balance of equities" tilts against a stay pending (a procedurally and substantively dubious) appeal of this Court's Order. *WMATC*, 559 F.2d at 844; *see Petroleum Jobbers*, 259 F.2d at 925 ("Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents.").

4. The public's interest in a prompt and final determination of whether a sitting United States Congressman accepted and paid out bribes likewise counsels against a stay. In criminal cases

generally, "the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. * * * Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end." *Flanagan*, 465 U.S. at 265. That principle applies with special force here, not only because of the uniquely public nature of the wide-ranging international bribery offenses under investigation, but because (it bears repeating) 16 months have passed since the investigation began into Rep. Jefferson's involvement in those schemes. Further delaying that investigation would be contrary to the strong public interest in bringing the investigation to a just conclusion.

Finally, the obvious fact that "the public will benefit from full and fair consideration" of Rep. Jefferson's constitutional claims (Mot. 5) does not dictate granting a stay pending appeal. This Court has already given substantial consideration to the Congressman's claims and has found them wanting. Just as significantly—and assuming that it has jurisdiction to do so—the D.C. Circuit will likewise fully and fairly consider Rep. Jefferson's appeal whether a stay is granted or not. The only question is whether the members of the filter team, who have been otherwise screened off from the investigation, are entitled to review a narrow range of potentially relevant documents in the meantime. There can be no doubt that they are, and that the public will be the ultimate beneficiary of their expediting that review.

*** * ***

CONCLUSION

Accordingly, and for the reasons set forth in the Government's earlier pleadings, Rep. Jefferson's Motion for Stay Pending Appeal should be denied.

Respectfully submitted.

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[*] The U.S. Attorney is recused from this matter.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing opposition has this day been served on counsel for Representative William J. Jefferson by electronic mail at the following address: ajackson@troutcacheris.com. I have also served a copy of the response by electronic mail on Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives at the following address: kerry.kircher@mail.house.gov.

July 13, 2006

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